IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1862

In re Grand Jury Witness,
JOHN DOE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals, Ninth Judicial Circuit.

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REQUEST TO USE FICTITIOUS NAMES.

Petitioner brings this Petition using the name "John Doe." Petitioner's life would be placed in extreme danger if the facts of this case became public.

With the approval of the Government, all proceedings in the District Court were held *in camera* and the transcripts and all exhibits were ordered sealed. Further, the record on appeal was ordered to be transmitted sealed to that court.

The Court of Appeals sealed the record on appeal including all briefs. In rendering its decision, the Court of Appeals referred to the Petitioner as "John Doe" and ordered its opinion to be unpublished.

Petitioner, understanding that records of this Court cannot be sealed, has, with the approval of the Clerk of the Court, changed petitioner's name throughout the Petition to "John Doe." The F.B.I. agent primarily involved has been designated as "Agent Smith" and his superior as "Agent Jones." These changes were made solely to protect the identity of the petitioner from those who may wish to do him harm. Petitioner further requests that the record below and the transcripts and all exhibits be sealed and made unavailable for public inspection.

In the event the United States Supreme Court will not process this Petition in the manner thus requested, then petitioner abandons this Petition for Writ of Certiorari.

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Petition for Writ of Certiorari to the United States Court of Appeals, Ninth Judicial Circuit.

The petitioner, John Doe, respectfully prays that a writ of certiorari issue to review the memorandum opinion of the Court of Appeals for the Ninth Circuit, filed May 10, 1977, which affirmed the order of the District Court for the Central District of California, holding petitioner in civil contempt.

Opinion Below.

The Ninth Circuit Court of Appeals, in a memorandum opinion, affirmed the order of the District Court.* The Ninth Circuit entered an order, denying the petition for rehearing.*

*See copies of orders at Appendices "A", "B", and "C" respectively.

Jurisdiction.

The order of the Ninth Circuit denying the petition for rehearing was filed on May 26, 1977. This petition for certiorari was filed within the time prescribed by the Ninth Circuit Court of Appeals in its Order Staying Issuance of Mandate.* This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented.

1. Who has the burden of proof, the witness or the government, to show the non-existence of an understanding of confidentiality when the witness has acted in detrimental reliance?

2. What test should be used—subjective or objective, or reasonable man standard—in determining whether an understanding of confidentiality exists?

3. Whether an admonition is required for due process purposes in order to assure a knowing and intelligent choice by a potential witness who objectively manifests a misunderstanding as to whether an understanding of confidentiality exists.

4. Whether there was sufficient evidence to find petitioner in contempt.

5. Whether threat of death at the hands of the target suspects, together with other facts can be relevant in a determination of "just cause" under 28 U.S.C. §1826.

6. Whether the witness can be adjudged in contempt pursuant to 28 U.S.C. §1826 if the government can obtain an indictment and conviction without the testimony of the witness.

7. Whether the designation of a "suitable place" of confinement of a recalcitrant witness (§1826(a)) is delegable to the United States Marshals.

8. Whether the Ninth Circuit Court of Appeals was required to address the seven issues raised on appeal rather than merely one issue.

Constitutional Provision Involved.

The pertinent provision of the Fifth Amendment to the Constitution is set forth in Appendix "D."

Statement of Facts.

Petitioner John Doe met with Agent Smith of the F.B.I. on April 12, 1976 to enlist the Bureau's help for a friend who had been threatened. (R.T. 9-10.)[1] Prior to that date, Agent Smith had been to petitioner's office several times, but petitioner had never supplied the agent with any information. (R.T. 8-9.)

At the April 12 meeting, petitioner opened Agent Smith's jacket looking for a transmitter. Petitioner also asked Agent Smith if he had a microphone or a wire on his person. (R.T. 10-11.) Petitioner explained to Agent Smith that he would speak to him only if given the assurance that he would not be "burned" (*i.e.*, his cooperation would be kept secret). Agent Smith replied "you're talking to me," which petitioner understood to mean that the conversation would be secret (R.T. 11), *i.e.*, a promise of confidentiality. (R.T. 31:8-10.)

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[1]The record on appeal contains transcripts of hearings held on March 15, 1977, March 17, 1977 and April 15, 1977. Unless otherwise indicated, references in this Petition to "R.T." will refer to the Reporter's Transcript of the March 17, 1977 hearing.

Petitioner offered his assistance in a current F.B.I. investigation where petitioner's friend had been a victim. He asked for nothing in return, save that Agent Smith would immediately pick up petitioner's child at school if petitioner's cooperation ever became known. Agent Smith said that he understood the danger which petitioner feared if their conversation became public. (R.T. 12.)

At their next meeting on April 15, 1976, petitioner repeatedly told Smith that he did not want to be "burnt with this information" for fear of danger to himself and his family. (R.T. 14.) Petitioner gave the information because he understood the cooperation would be secret and he would never be called as a witness. (R.T. 15.)

Petitioner informed Agent Smith about a forthcoming meeting that he would attend with the suspects of the F.B.I.'s investigation. Petitioner asked Agent Smith to have the meeting surveilled. Petitioner understood that no one else would know that petitioner had provided this information. (R.T. 16.)

At all times during his cooperation, petitioner had complete trust in Agent Smith and understood that the agent would not disclose petitioner's role. (R.T. 19, 25.) He relied on Smith's word as an F.B.I. agent that his information would not be made public. (R.T. 23.)

Although asked by Smith many times if he would even consider being a witness, petitioner always replied "no," (R.T. 94, 20) because of fear for his own life and the lives of his wife and child. (R.T. 25.)

Several days after the F.B.I. surveilled the meeting between petitioner and the suspects, Agent Smith told

petitioner for the first time that he "may have to be a witness." (R.T. 17.) Petitioner was surprised and extremely upset. Agent Smith tried to placate him by saying it was out of his hands, and that he had to turn the matter over to his superiors. (R.T. 17.) Agent Smith then arranged a meeting between petitioner and Smith's superior, Agent Jones. (R.T. 21.) Petitioner met with Agent Jones, but to no avail.

Agent Smith testified that he believes some of the suspects in question to be physically dangerous people. (R.T. 55.)

At their April 12, 1976 meeting, Mr. Doe looked inside Agent Smith's jacket and asked if he was carrying a recorder. From the outset, petitioner asked for confidentiality. (R.T. 58.) (Agent Smith understood the term "burn" to mean exposing someone who is supplying information confidentially. (R.T. 66:8.))

Agent Smith testified that he informed petitioner that there was an ongoing investigation by the F.B.I. of the target individuals, that ultimately the matter could conceivably go before a federal grand jury, and that it was not inconceivable that he might be subpoenaed and could even be granted immunity. (R.T. 59:5-9.) None of the above admonitions was included in the agent's report which indicates that the only thing stated was that no promises of confidentiality could be made. (R.T. 60:2-11.)

Agent Smith acknowledged that when John Doe expressed concern that the information that he was giving might be made public, he probably responded with the words "you're talking to me." (R.T. 61.)

At the April 20, 1976 meeting, John Doe again checked Smith for a recorder and said he would incur

contempt rather than testify. Smith told him that he could conceivably be subpoenaed and even be granted immunity. (R.T. 61-62.)

At each of their next five meetings, John Doe stated that he was in fear of his life and would not be a witness even if he was held in contempt. Agent Smith made written reports of each of these five meetings which reflect John Doe's views. Those reports, however, do not include any statement that John Doe was advised at those meetings that no promises of confidentiality could be made. (R.T. 64.)

When asked if petitioner said "what the fuck are you doing to me?" after being told he might be used as a witness, Smith replied, "he might have." (R.T. 75-76.)

At the hearing on the Order to Show Cause re Contempt, the transcript of the earlier hearing on petitioner's motion to estop was received into evidence. (R.T., April 15, 6.) In addition to this transcript, appellant sought to introduce evidence of the danger to petitioner's life. As part of an offer of proof requested by the District Court, petitioner marked Exhibits A and B, articles from the Los Angeles Times and Time Magazine concerning the murders of informants over the past two years. (R.T., April 15, 7:16-23; 14: 20-25; 19:17-24.) Further, petitioner made the following offer of proof as to the testimony of F.B.I. Agent Jones.

> "I would expect Agent [Jones] to testify that those facts present in particularly the Time magazine article are basically true and that there has been during the last two-year period a pattern of the killing of witnesses who are in fact not

> merely victims, but informants, by organized crime, by the Mafia, and that the people involved in this case, and specifically the person that the Government wishes Mr. [Doe] to talk about, is in fact a member of organized crime, is a dangerous person, is the same person that is named in this article as a suspect in the Bompensiera murder, and that in Agent [Jones'] view, if Mr. [Doe] did testify, he would certainly fall into the same category as many of the twenty people that have been killed during the last year." (R.T., April 15, 8:15-9:2.)

Following this offer, the court refused to admit this evidence, relying on *Dupuy v. United States,* 518 F.2d 1295 (9th Cir. 1975). (R.T. 25:16-17.)

Further, petitioner sought a statement from the government that petitioner's testimony was necessary to secure an indictment and a conviction of the suspects. The government refused to state whether petitioner was a necessary or essential witness (R.T., April 15, 23-24), and the District Court ruled that the government need not divulge this information. (R.T., April 15, 25.)

REASONS FOR GRANTING THE WRIT.

I

The Burden of Proof Rests With the Government to Show the Non-Existence of an Understanding of Confidentiality When the Witness Has Acted in Detrimental Reliance.

A person may enforce an informal agreement with the government

> ". . . if, after having utilized its discretion to strike bargains with potential defendants, the Government seeks to avoid those arrangements by using the courts, its decision so to do will come under scrutiny. If it further appears that the defendant, to his prejudice, performed his part of the agreement while the Government did not, the indictment may be dismissed." *United States v. Paiva*, 294 F.Supp. 742, 747 (D.D.C. 1969).
>
> ". . . we conclude that if the promise was made to defendant as alleged and defendant relied upon it . . . the government should be held to abide by its terms." *United States v. Carter*, 454 F.2d 426 (4th Cir. 1972).

And, see *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971).

An agreement not to call an individual as a witness would obviously be enforceable under the same rationale and would constitute just cause for failure to answer questions before the grand jury. *See, In the Matter of John Doe*, 410 F.Supp. 1163 (E.D.Mich. 1976).

In determining whether such an agreement existed, petitioner respectfully submits that at his hearing to estop the government from granting the application

for immunity, and at the Order to Show Cause re Contempt, the District Court erroneously concluded that petitioner had the burden of proof to show that promises of confidentiality had been made.

The essential confusion on the court's part resulted from its failure to differentiate between the burden to go forward (burden of producing evidence), and the ultimate burden of proof.

Defense counsel's statements at the March 17, 1977 hearing are perfectly consistent with acknowledgement that the former burden was his:

> "[DEFENSE ATTORNEY]: Well, your Honor, [the prosecuting attorney] and I have discussed this question, and since I am the moving party, I suppose, I think it is incumbent upon me to present evidence.
>
> THE COURT: I will not quarrel with that." (R.T. 5:6-9.)

At the time argument was called for, the court was unspecific as to which burden it referred to:

> "THE COURT: All right. You do have the burden in this matter, [Mr. Defense Attorney], and you may proceed." (R.T. 95:21-22.)

In stating its findings, however, the court utilized language which makes it patently clear that the burden of proof had been assigned to petitioner, and further, that the weighing of the evidence adduced at the hearing was inextricably connected to the delegation of the burden of proof.

> "THE COURT:
>
> . . .
>
> I find Mr. [Smith] to be a credible witness and I find that the *burden of the moving party,*

> *Mr. [Doe], which is to establish that promises of confidentiality and immunization against immunity, again, has not been met in this matter.* I find that no promises were made to Mr. [Doe] in terms of that immunity, and I deny the motion to estop. That will be the findings of the Court in this matter." (R.T. 115:14-20.) (Emphasis added.)

Research discloses no case authority allocating the burden of proof with respect to understandings of confidentiality. Another case set in the same context of resistance to a contempt order by a witness asserting a prior agreement that he would not be called to testify is *United States v. Cohen,* 358 F.Supp. 112 (S.D.N.Y. 1973), reversed in part and affirmed in part *sub nom. United States v. Huss,* 482 F.2d 38 (2d Cir. 1973). However, neither the District Court nor the Second Circuit Court of Appeals discussed this critical and fundamental issue of burden of proof.

In the absence of authority, it is appropriate to analogize petitioner's case to other issues of criminal procedure wherein the citizen is alleged to have knowingly waived a fundamental right.

The government through Agent Smith apparently concedes that petitioner initially demanded confidentiality as a condition for his cooperation. To cooperate without confidentiality would jeopardize his right to life and liberty. The government's contention is that petitioner knowingly waived that right and agreed to cooperate without confidentiality.

In demonstrating any waiver, the burden of proof rests indisputably with the government. A prosecutor who seeks to rely upon consent to justify the lawfulness of a search has the burden of proving, by a preponderance of the evidence, that the consent was, in fact, freely and voluntarily given. *Schneckloth v. Bustamonte,* 412 U.S. 218, 36 L.Ed.2d 854, 93 S.Ct. 2041 (1973). Further, on appeal, the burden is on the government to prove beyond a reasonable doubt that an error involving a violation of a constitutional right (no intelligent waiver) was harmless. *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

An analogy may be drawn with the burden of proof established by 18 U.S.C. §3504:

> "§3504. Litigation concerning sources of evidence.
>
> (a) In any trial, hearing or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States—
>
> (1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;
>
> (2) disclosure of information for a determination if evidence is inadmissible because it is the primary product of an unlawful act occurring prior to June 19, 1968, or because it was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, shall not be required unless such information may

be relevant to a pending claim of such inadmissibility; and

(3) no claim shall be considered that evidence of an event is inadmissible on the ground that such evidence was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, if such event occurred more than five years after such allegedly unlawful act.

(b) As used in this section 'unlawful act' means any act the use of any electronic, mechanical or other device (as defined in section 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto."

Although the application of §3504 has thus far been confined to wiretap cases, petitioner contends that the government's disavowal of a promise of confidentiality is an "unlawful act" within the meaning of "any act" as set forth in §3504(b). Support for this position is found in the decision of the Court of Appeals for the Second Circuit in *In re Millon,* 529 F.2d 770, 773 (2d Cir. 1976). In construing §3504, the Court held that the section concerned the "fruit of an illegal act *such* as wiretap." *Millon* at 773 (emphasis added). Section 3504 apparently places the burden of proof on the government once a prima facie case is made. *United States v. Huss,* 482 F.2d 38 (2d Cir. 1973).

Irrespective of whether §3504 applies to the fact situation at bar, by analogy when a prima facie showing of a promise is made, the government should have the burden of proof to show no promise was made.

It is clear that the allocation of the burden of proof was of critical significance at the hearing. The court found that (1) Agent Smith was a credible witness and (2) that "Mr. [Doe] believes, unilaterally and subjectively that he is entitled to be immunized from immunity." (R.T. 115.) Based on the state of the evidence, the allocation of the burden of proof was critical to the court's finding:

"THE COURT: Well, gentlemen, this is a difficult decision to be made. . . ." (R.T. 114:19-20.)

Petitioner respectfully requests that this Court find that the burden of proof rests with the government and remand the case for further proceedings.

II

The District Court Used an Erroneous Test in Determining Whether an Understanding of Confidentiality Existed.

At the March 15, 1977 hearing on petitioner's motion to estop the government, defense counsel proposed the correct test to be applied in evaluating petitioner's claim.

"THE COURT: Well, I know your position: that the subjective state of mind of the prospective witness should control. Is that not your position, or one of your positions?

[DEFENSE ATTORNEY]: One of my positions, yes, your Honor, would be that the state of mind of Mr. [Doe], as long as it was reasonable—I think that has to be added to it—should control, and as long as there is reliance upon the Government, although the Government may not have

meant what Mr. [Doe] believed that it had said, yes, your Honor. But I think you need two elements. I think you need some action on behalf of the Government that would lead a reasonable man to believe that this was the disposition. And so merely 'subjective' I think would be going too far, because I think that would allow a psychotic personality to come into court who really did believe something and somehow estop the Government from proceeding, and I think that would be an incorrect ruling, and that is not the position that I wish to take." (R.T., March 15, 23:9-25.)

In argument at the March 17 Order to Show Cause hearing, defense counsel expressed the opinion that, based upon the evidence, an understanding of confidentiality existed under *any* test, *i.e.*, reasonable man standard (R.T. 101), objective and subjective. (R.T. 103.) The government proposed an ambiguous hybrid test:

> ". . . the standard which must be applied here is whether or not the Government made any actual promises or whether or not it did anything which could create a reasonable reliance by Mr. [Doe] upon any action by the Government that would suggest his information would be held in confidence." (R.T. 107:3-8.)

The court framed the issue as follows:

> "[W]hether or not, measured by an objective standard, Mr. [Doe] can place reasonable reliance upon comments of Agent [Smith] and believed that he was, as stated by [the defense attorney] immunized from immunity in this matter." (R.T. 114:19-25.)

As that standard would dictate, the court, appropriately, next summarized the evidence as to petitioner's state of mind with respect to the understanding of confidentiality.

> "I think that clearly there has been a misunderstanding. Mr. [Doe] believes, unilaterally and subjectively, that he is entitled to be immunized from immunity." (R.T. 115:1-3.)

However, the court ignored its own determination that "reasonable reliance" was the issue and that petitioner *had* a subjective, although mistaken belief. Instead, the court denied the motion to estop based on the finding that "*no promises were made* to Mr. [Doe] in terms of that immunity." (R.T. 115:18-19.) (Emphasis added.) Thus, ultimately, the witness' subjective belief that an understanding of the confidentiality existed was found to be immaterial.

The United States District Court for the Southern District of New York was faced with a similar problem of determining the correct test in *United States v. Cohen*, 358 F.Supp. 112 (S.D.N.Y. 1973). In determining whether or not the promise of confidentiality had been made, the Court first applied an objective test as to whether the potential witness had been given an unqualified assurance that he would not be called to testify. In *Cohen*, however, unlike the case at bar, the Court went on to evaluate whether the potential witness was reasonably entitled to his subjective opinion (at 124-125).

Petitioner was entitled to the same determination of whether his subjective reliance was reasonable and the case should be remanded to the District Court for further proceedings in this regard.

III

Due Process Required That Petitioner Receive Certain Admonitions.

Even if the court employed the correct test and if it could be said that petitioner's subjectively held belief was unreasonable, petitioner should nevertheless not be held in contempt. It was Agent Smith's duty to right the misunderstanding which was objectively manifested.

The record is replete with accounts of petitioner's repeated insistence upon confidentiality. The District Court recognized that petitioner believed that such confidentiality was, indeed, agreed upon. Obviously, whatever indicia of misunderstanding the court was able to perceive in petitioner, were also then apparent to Agent Smith.

"Q. Okay. And each of those times Mr. [Doe] told you, did he not, that he would incur contempt rather than to testify?

A. [Agent Smith] Yes.

Q. Did he also further explain at subsequent meetings that he felt he was in danger if it ever did become public?

A. Oh, yes.

Q. Many times?

A. Well, sure." (R.T. 64-65.)

The Fifth Amendment guarantee that no person shall be deprived of life or liberty without due process of law has clear application to petitioner's case.

Petitioner repeatedly and vehemently stressed that he would go to jail before he would testify. Agent Smith knew of the importance of the ongoing investiga-

tion. Further, Agent Smith understood the manner in which the Grand Jury and United States Attorney's Office proceed. He was therefore well aware that Mr. Doe's liberty was in jeopardy. Indeed, the agent also knew the risks to petitioner's life, believing as he does that the target subjects are dangerous. (R.T. 55.)

Under these circumstances it was incumbent upon the agent to adequately admonish petitioner with respect to the extremely perilous position in which Smith placed him. Where a citizen is considering acting as a government agent and objectively manifests a misunderstanding as to whether an understanding of confidentiality exists, it becomes incumbent upon the government to disabuse the citizen of such misunderstanding. Without such action by the government, the citizen's efforts and assistance have been unlawfully appropriated. Due process requires that the citizen knowingly waive his demand for confidentiality.

Smith clearly had ample opportunity to correct the misunderstanding as to what petitioner might expect. A particularly appropriate time to correct what was allegedly an unfounded reliance on confidentiality occurred at the April 15, 1976 meeting.

"Q. . . . [A]ccording to your report, Mr. [Doe] then mentioned that if his name was mentioned as a source of activity, he would cease and desist giving any information whatsoever. Did you advise him again after that that you might have to make it public and that may happen?

A. No. That had been gone over sufficiently." (R.T. 63:5-11.)

However, according to his testimony, Agent Smith had *already* relayed the information to his superiors.

(R.T. 66:21-25.) There is no indication in the reports or in Smith's testimony that petitioner was informed that disclosure of his name was already a *fait accompli*. In fact, as evidenced by reports of their next five meetings, from that time forth, Smith discontinued advising Doe that no promises of confidentiality could be made. (R.T. 64:8-18.)

At the hearing on immunity, defense counsel contrasted the negligence exhibited in this case to the care taken to insure a knowing waiver in other contexts, *i.e., Miranda* warnings and the entry of a plea in federal court. (R.T. 110-111.)

Rigid due process guarantees have been afforded to an increasingly broad spectrum of contexts including parole and probation, administrative hearings, civil commitment, etc. The basic tenet remains that in order to relinquish a privilege or right there must be a knowing and intelligent waiver. *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019 (1937). Further, the government bears the burden of showing such a waiver by a preponderance of the evidence. (See Argument I, *supra.*)

Petitioner's situation most definitely represented a relinquishing of constitutional rights to life and liberty and warranted a careful explanation and determination that the waiver was knowing and intelligent.

Clearly, the agent's alleged disclaimer that no promise of confidentiality could be made is woefully inadequate to satisfy the government's burden. Any message to be derived from that statement was vitiated at the outset of the series of communications by Smith's statement "you're talking to me."

The government, through its agent, has placed petitioner in an unconscionable position. The manipulation seen in this case demonstrates a situation wherein due process was blatantly ignored.

The issues herein raised have implications far beyond this case. This Court will surely consider the sound reasons of public policy which militate against holding petitioner in contempt. For unless confidentiality, once assured, is preserved, sources of information indispensable to law enforcement will vanish if the ordinary citizen realizes he has been deceived by the government.

Lawlessness in law enforcement is clearly no more tolerable than in the citizenry.

The crux of this case was precisely phrased in *United States v. Carter, supra,* at 428:

> "There is more at stake than just the liberty of this defendant. At stake is the honor of the government public confidence in the fair administration of justice, and the efficient administration of justice in a federal scheme of government."

A strikingly similar situation was presented in *In the Matter of John Doe,* 410 F.Supp. 1163 (E.D. Mich. 1976). The analysis made by the District Judge is particularly enlightening.

> "This action presents the limited issue whether the court must grant immunity to a prospective Grand Jury witness who has earlier relied upon the promise of a governmental agent that he would not be the subject of questioning . . .
>
> . . .
>
> "Doe moves to vacate the immunity order on the ground that for the Grand Jury to question

him in violation of his agreement with federal agents would violate due process. Doe asserts that [Special Agent of the F.B.I.] Wicklund's promise is binding upon the United States Attorney and invokes the court's discretionary and supervisory powers over the Grand Jury to protect his interest in the fair administration of justice. The government urges that, before Doe may lay claim to a violation of his right to due process for the government's broken promise, he must demonstrate some prejudicial reliance upon it. For the reasons which follow, the court holds that judicial integrity and the interests of justice dictate vacation of the immunity order.

. . .

"Apart from the immunity statute, the court plays a general supervisory role in the fair administration of justice. *United States v. Rodman,* 519 F.2d 1058, 1060 (5th Cir. 1975); *cf. Mallory v. United States,* 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1959); *McNabb v. United States,* 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943). Moreover, the court has a residuum of supervisory power over the Grand Jury and a responsibility to curb its improper use. *United States v. Dionisio,* 410 U.S. 1, 9, 93 S.Ct. 764, 769, 35 L.Ed.2d 67, 76 (1973); *Branzburg v. Hayes,* 408 U.S. 665, 688, 92 S.Ct. 2646, 2660, 33 L.Ed.2d 626, 643 (1972).

. . .

". . . judicial integrity and 'the interests of justice', both themes of *Santobello,* would be offended if the court ratified the government's broken promise to Doe by reaffirming the immunity order.

For whatever reason, Doe agreed to surrender contraband in return for immunity from questioning. Federal agents agreed and accepted the cocaine. The government may not now breach this promise with the court's aid by substituting immunity from prosecution for immunity from questioning.

"Neither may the government insist that Doe demonstrate some prejudice before claiming a violation of his rights in the government's broken promise. No prejudice, apart from that suffered by the administration of justice, was apparent in *Santobello.* Moreover, Doe has alleged that his testimony on the subject in dispute will endanger his life. Although fear of harm does not excuse a witness from testifying before the Grand Jury, potential harm to the witness may be relevant where, as here, the witness and the government bargain beforehand to be excused from giving testimony. *Compare DuPuy* (sic) *v. United States,* 518 F.2d 1295 (9th Cir. 1975).

"In this limited context the government may not rely upon distinctions between express, implied, and apparent authority among its agents in avoiding the effect of its promise. These distinctions have meaning for the legal technician, not for the layman dealing with the 'government' in his negotiations. The solution to agents who bargain away the government's rights is tighter administrative control within the executive branch. *See United States v. Carter, supra,* at 428; *United States v. Barrett,* at 1024-25.

"For the foregoing reasons, the court holds that to immunize a prospective Grand Jury witness

who has earlier relied upon the promise of a government agent that he would not be the subject of questioning does violence to both judicial integrity and the interests of justice." at 1164-66.

IV

There Was Insufficient Evidence to Find Petitioner in Contempt of Court.

Even assuming, *arguendo,* that the District Court (1) properly placed the burden of proof upon petitioner to show the existence of an understanding of confidentiality and (2) employed the correct test in determining whether such an understanding existed, the evidence does not support the findings of the court that "just cause" did not exist.

Evidence of acts of both Agent Smith and petitioner support petitioner's claim that he reasonably believed that an understanding existed.

(1) Both parties testified that at their first of eight meetings, petitioner looked inside Agent Smith's jacket and asked if he was carrying a recorder. Such an act clearly manifested petitioner's concern for confidentiality.

(2) *Each and every* report prepared by Agent Smith includes a notation that petitioner advised Smith that he would incur a contempt citation rather than testify. Indeed, this explanation constituted the prelude to their initial meeting. The understanding of confidentiality was logically a condition precedent to any further communications between the two men.

Petitioner received Smith's assurance when the latter responded "you're talking to me." While Agent Smith concedes that he probably used those words, his proffered explanation of their significance is simplistic and ludicrous: "Obviously, he was talking to me;" (R.T. 61:19.) "Well, he knew who he was dealing with; he was dealing with me." (R.T. 85:15-16.)

Counsel for the government has attempted to assign another interpretation to the phrase:

> "Q. All right. And did you mean by that to convey that you're a person who would be careful and protect him if possible?
>
> A. Yes, indeed.
>
> Q. And have you attempted to do so?
>
> A. Yes, indeed." (R.T. 85:17-21.)

It is indisputable that petitioner sought assurances of protection in the sense of confidentiality, rather than physical protection, in a literal sense. This after-the-fact attempt to semantically rob the statement of its obvious import must fail.

(3) A warning that no promise of confidentiality could be made was allegedly given at only the first two meetings in mid-April, 1976. At the subsequent five meetings commencing some two weeks later, May 3, 1976, and continuing through June 10, 1976, despite Doe's continuing demand of confidentiality and his insistence that he would never testify, he was never warned again.

> "Q. . . . Did you advise him again after that that you might have to make it public and that may happen?
>
> A. [Agent Smith] No. That had been gone over sufficiently." (R.T. 63:9-11.)

Further, the F.B.I. reports themselves (received into evidence as Government Exhibit #1 at R.T. 85) disclose petitioner's reiteration of the agreement of con-

fidentiality at the later meetings. Warnings by Agent Smith that confidentiality was not promised are conspicuously absent from the reports of these later meetings.

(4) Mr. Doe's complete trust in Agent Smith was amply supported by petitioner's actions. (R.T. 24:6-7; 23:11-14.) Petitioner discontinued checking the agent for microphones (R.T. 24:3-4; 31:22-24), and even called Agent Smith at the F.B.I. offices.

In conclusion, petitioner satisfied the requirement of showing "just cause" to comply with the court's order to testify. There was insufficient evidence to hold him in contempt as a recalcitrant witness pursuant to 28 U.S.C. §1826.

V

The Threat of Death Is Relevant in a Determination of "Just Cause" Under 28 U.S.C. §1826.

In ruling upon petitioner's offer of proof as to the danger to his life should he testify, the District Court relied upon the authority of *Dupuy v. United States,* 518 F.2d 1295 (9th Cir. 1975) for the proposition that even a reasonable fear of retaliation is not a sufficient defense to a civil contempt proceeding. (R.T., April 15, 21:19-23.)

In light of this Court's opinion in *Dupuy, supra,* it is true that fear of harm *alone* cannot constitute just cause. It is, however, a factor to consider where there is a pre-existing bargain between the witness and the government to excuse the witness from giving testimony. *In the Matter of John Doe,* 410 F.Supp. 1163, 1166 (E.D. Mich. 1976).

A determination of whether just cause exists requires a balancing of equities and, surely, in this context, the potential death of the witness demands some consideration.

It is of pivotal importance that petitioner was not in the position of an innocent bystander who, by happenstance, witnessed an offense. Instead, petitioner actively became a government agent. The danger to petitioner does not flow from the fact that he was a mere witness, but from the fact that he was an agent. For this additional reason, petitioner's case is readily distinguishable from *Dupuy, supra.* Accordingly, petitioner requests that the case be remanded to allow petitioner to present evidence of harm should he testify.

VI

If the Government Can Obtain an Indictment and Conviction Without the Testimony of the Witness, Petitioner Should Not Be Held in Civil Contempt.

At the Order to Show Cause hearing, defense counsel attempted to elicit from counsel for the government whether the government could indict and convict the target subjects without the testimony of petitioner. Petitioner urged that if that were the case, it would be wrong to hold petitioner in contempt as the equities suggested by "good cause shown" were clearly in petitioner's favor. (R.T., April 15, 20-22.)

The government asked for a ruling from the court as to the necessity for divulging such information. (R.T., April 15, 23-24.)

The court ruled that there was no legal requirement for the government to reveal whether there were other

witnesses who could provide the needed testimony. (R.T., April 15, 25:2-12.)

Under the unusual circumstances of this case, *i.e.*, some evidence of an agreement of confidentiality, the court should properly have required the government to state its good faith belief that the testimony is essential.

> "Federal law, 28 U.S.C. §1826, plainly contemplates a relatively broad latitude in which a district judge may exercise his discretion in deciding whether to incarcerate a recalcitrant witness." *In re Buonacoure*, 412 F.Supp. 904 (E.D. Pa. 1976).

Given such discretion afforded by §1826 ("may"), the court was called upon to perform a balancing of the equities.

It is indisputably in petitioner's favor that he has already sacrificed a great deal in voluntarily providing invaluable assistance to the F.B.I. His life would unquestionably be in danger were he to testify because his testimony would eventually disclose his complicity with the government. The reason that fear of retaliation *alone* is not enough to excuse a refusal to testify is based on society's need for information.

> "Every citizen of course owes to his society the duty of giving testimony to aid in the enforcement of the law . . . '[T]he public has a right to every man's evidence.'" *Piemonte v. United States*, 367 U.S. 559, 6 L.Ed.2d 1028, 1031, fn. 2, 81 S.Ct. 1720 (1961).

However, the underlying assumption must be that such evidence is essential. Yet, in petitioner's case, the importance of his testimony is unknown. When

balancing petitioner's extreme interest against the unknown importance of his testimony, petitioner's interests should prevail.

VII

The Court Improperly Delegated the Designation of a Suitable Place of Confinement to the United States Marshal.

28 U.S.C. §1826(a) provides for a summary order of confinement at a suitable place. This section has been construed as giving wide discretion to the trial court. When a witness was confined pursuant to §1826 and was directed to the custody of the Attorney General, the Court of Appeals held as follows:

> "Presumably the District Judge intended to exercise his 28 U.S.C. §1826(a) privilege to select a suitable place of confinement for Thurmond, and we think it likely that the direction that Thurmond be committed to the custody of the Attorney General was an inadvertence arising from the usual procedures for sentencing." *In re Grand Jury Proceedings* 534 F.2d 41, 43 (5th Cir. 1976).

In the case at bar, although willing to make a recommendation as to the place of confinement, the court held that the discretion rested with the Federal Marshal and not with the court. (R.T., April 15, 31-32.)

Accordingly, this matter should be remanded to the District Court with instruction to exercise its discretion.

VIII

The Circuit Court of Appeals Is Required to Address All Issues Raised on Appeal.

The Ninth Circuit Court of Appeals has ignored its own pronouncement that an appeal in a criminal case imposes on the appellate court the duty of determining all questions properly raised by petitioner. *Leahy v. United States*, 272 F.2d 487 (9th Cir. 1959).

Petitioner raised seven issues of substantial importance on appeal. In its Memorandum Opinion, the Court of Appeals addressed but one issue, the sufficiency of the evidence. Even that contention was summarily disposed of in two sentences. In its obvious haste to reach a decision within the thirty day rule of 28 U.S.C. §1826(b), the Court of Appeals overlooked or ignored valid appellate issues. Issues as critical as due process, burden of proof, and propriety of test utilized by the District Court, brought before the Court of Appeals by petitioner were ignored.

Petitioner is entitled to have all these issues decided in order to provide the precursor for review by this Court. The Ninth Circuit's brief order under the circumstances of this appeal—*in camera*, and thus unpublished, and expedited—gives the appearance that petitioner deserves less attention than other appellants in different circumstances. The kind of terse opinion issued is more appropriate to a non-meritorious writ than an appeal. When an appeal is undertaken, each issue raised is entitled to determination. From the Court of Appeals' opinion in petitioner's case, it appears that the majority of the issues were not even considered.

Conclusion.

For the foregoing reasons, petitioner respectfully submits that the Writ of Certiorari should be granted as prayed for.

Respectfully submitted,

LAPPEN, ABELSON AND HARRIS,
A Professional Corporation,
By ROBERT N. HARRIS,
Attorneys for Petitioner.

APPENDIX "A".

Memorandum.

United States Court of Appeals, for the Ninth Circuit.

In re Grand Jury Witness, "JOHN DOE," Appellant, v. United States of America, Appellee. No. 77-1913.

Filed: May 10, 1977.

Appeal from the United States District Court for the Central District of California.

Before: ELY, HUFSTEDLER and CHOY, Circuit Judges.

The appellant challenges his obligation to answer questions put to him by a regularly constituted Grand Jury. He alleges that when he previously spoke to a government investigator in respect to the subject, the investigator made the positive representation that all revelations made by the appellant would remain confidential, disclosed to none save the investigator.

After conducting a hearing, the district court found that the investigator had made no such representation. This finding, supported by substantial evidence, is fatal to the appellant's asserted right to recalcitrance.

AFFIRMED.

/s/ Walter Ely
/s/ Shirley Hufstedler
/s/ Hubert Y. C. Choy
UNITED STATES CIRCUIT JUDGES

APPENDIX "B".

Order.

United States Court of Appeals, for the Ninth Circuit.

In re Grand Jury Witness, "JOHN DOE", Appellant, v. United States of America, Appellee. No. 77-1913.

Filed: May 26, 1977.

On Petition For Rehearing

Before: ELY, HUFSTEDLER, and CHOY, Circuit Judges.

The Petition for Rehearing is denied.

/s/ WALTER ELY

APPENDIX "C".

Order Staying Issuance of Mandate.

In re Grand Jury Witness John Doe, Appellant, vs. United States of America, Appellee. No. 77-1913, DC # Misc. 5853.

Filed: June 16, 1977.

Upon application of Elliot J. Abelson, Esq. counsel for the Appellant, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41(a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Appellant herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before June 27, 1977.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

/s/ Walter Ely
WALTER ELY
United States Circuit Judge.

DATED: Maui, Hawaii
June 13, 1977

APPENDIX "D".

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.